No. 11904.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDNA D. HEATH, Executrix of the Last Will of FRED W. HEATH, Deceased, and MYRA C. KNAPP, Executrix of the Last Will of DANIEL A. KNAPP, Deceased,

Appellants,

vs.

JOHN N. HELMICK, Trustee of the Estate of MELANIE DOUILLARD WOODD, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Real Parties in Interest.

It is true that the bankrupt is not a party to this appeal, but the Record will show that she considered herself a party in interest all through the proceeding and on the review of the Referee's order and the District Judge affirmed the Referee's orders against her [R. p. 83].

II.

Referee's Findings [R. pp. 57-62].

We respectfully contend that the Referee's findings fully comply with Rule 52. The only real issue presented to the Referee under the Order to Show Cause issued upon the petition of the Trustee [R. pp. 26-28] was the title of the Trustee and interest, if any, of the respond-

ents, and we fail to understand why it should be necessary to make a finding as to fraud.

The Referee found in Finding V [R. pp. 59-60] that some time after the sheriff's sale, and prior to the filing of the voluntary petition, a secret agreement was entered into between Fred W. Heath, Daniel A. Knapp, M. L. Hovey, and the bankrupt to reconvey the Virginia Avenue property to the bankrupt. It is elementary that when parties enter into secret agreements it is almost impossible to determine the exact time or the place of the making of the secret agreement, and all specific facts surrounding the making of the secret agreement that could ordinarily be ascertained are contained in the Referee's findings.

III.

Argument.

The evidence fully supports the findings of the Court, and the order made therein, and from a reading of the entire evidence there is ample testimony to support the conclusion that the secret agreement was entered into.

Now let us consider the facts leading up to the execution sale involving the Virginia Avenue property. Mr. Knapp himself testified to most of them.

When asked about the judgment rendered in the case of *Hovey v. Woodd,* he stated:

> "That action stemmed in a conversation in the office of Mr. Heath a day or so after a judgment was ordered in the case of Douillard v. Woodd, and in that conversation Mrs. Woodd was present, Mr. Heath, and myself; and at that time her attention was called to the fact that the probabilities were that the order of the court would mature in a judgment against her for $7,500 with costs, and either Mr.

Heath or I asked her what she wanted to do under that situation. She said that she wanted appeal, that she thought the judgment was an absolutely unjust judgment; she wished to appeal. We told her that it would require a great deal of extra work, that there had been a large amount of testimony and the transcript would be large, but we would have to examine it minutely, and whether the appeal was made upon a bill of exceptions or a transcript there would be a motion for a new trial and other motions (77) and a brief, until it reach possibly the Supreme Court; somewhere in that time Mr. Heath made the statement, 'You have paid nothing on this, Mrs. Woodd, so far in the way of fees, either to Mr. Knapp or myself, and there will be a great deal more of fees that will accumulate in this case; you also owe me for a large amount of work that I did prior to the time the Douillard case came up.' Mrs. Woodd asked about how much and he said, 'Actually I think about $2,000, and I think that the amount that would be due on this Douillard case, including the appeal and all, would be $5,000, that is rough, that is $7,000.00.' And Mrs. Woodd said she thought that was too much but she would be willing to give her Glendale property, but I told her at that time that I didn't think it wise or advisable to settle with her attorneys in that way, that I thought the best plan of getting at this and so there would be some feeling of contentment on her part, would be to take this before a court in a friendly suit and let the court decide on the amount that was due, and in the meantime we would try to attach anything we could find that she possessed, but it would be in pursuance of our action and in no other way, and we asked her what was her reaction on that and she could find no objection to it and said she

was willing to pay whatever the court might determine. The next day or so after that we brought an action for $7,000 and we also attached at that time the Glendale property, the Virginia Avenue property and all amounts (78) due and owing to Mrs. Woodd in the matter of Los Angeles v. Winter, 444,092, in the Superior Court; and also the Yarborough note; the amount due and owing at that time being $689.49. The amount due and owing under the Winter case being $436.50.

In pursuance of those matters a judgment was issued on July 8, 1941, and in the matter of Hovey v. Woodd for $4,000 and $20.25 costs. I was not present at that time except just as the case was closing and know nothing about how much evidence was introduced or anything else, except that there was a stipulation presented to me to sign, in which it was agreed that the amount of the judgment should be $4,000 as between Mrs. Woodd, Mr. Heath, and myself. . . ." [R. pp. 312-313.]

Mrs. Woodd was not represented by Mr. Heath and Mr. Knapp in the action referred to in his testimony [R. p. 405], but they continued to represent her on the appeal of the State Court judgment [R. p. 436], and all during this time Mrs. Woodd, and up to the date of the reopening of the bankruptcy proceeding, was in possession of the Virginia Avenue property [R. pp. 226-227].

These facts alone are very significant when taken into account the facts occurring after the filing of the petition in bankruptcy, to wit, on September 10, 1946, the proceedings were closed at which time the title to the Virginia Avenue property stood in the name of M. L. Hovey.

When the proceedings were reopened for further administration on December 4, 1946, the title to said property had been transferred to the bankrupt [R. pp. 38-42].

When the petition in bankruptcy was filed Mr. Heath was deceased. Mr. Knapp did not represent the bankrupt but testified on her behalf during the administration [R. p. 311], and when asked about his interest in the Virginia Avenue property, he stated two-fifths was his and three-fifths Mr. Heath's [R. p. 322].

However, when Mr. Heath's will was discovered for the first time and introduced into evidence it stated that Mrs. Woodd owed him $1,000.00 represented in the *Hovey v. Woodd* judgment [R. p. 412].

We respectfully contend that the findings disclose that all issues were disposed of in clear and concise language.

Appellants devote a great deal of argument to the language of Finding V in not specifying the date the "secret agreement" was entered into.

We submit that from a review of all of the evidence, such a finding as appellants suggest would be impossible and could only be drawn as an inference from the entire evidence.

We believe the chain of events occurring in this case amply support Finding V, to wit, the acquisition of the property by execution sale on behalf of Mr. Knapp and Mr. Heath, keeping the title to said property in Mr. Hovey's name up to the time of the filing of the petition in bankruptcy herein. The almost immediate transfer of

the title to the bankrupt after the case was closed. The bankrupt remaining in possession of the property at all times. The fact that Mr. Heath and Mr. Knapp sued the bankrupt through their assignee for attorneys' fees of $7,000.00, which apparently were for services rendered, if not entirely, at least in a large part, in defending the action brought against her for $7,500.00, and the act of continuing to represent the bankrupt on the appeal in said action, subsequent to the time they had sued her.

These are not normal nor usual actions in the ordinary practice of law.

In making his decision, no doubt the Referee and the District Court took into account the fact that Mr. Hovey was acting in a trust capacity, and the relationship of attorneys and client existed between Mr. Heath and Mr. Knapp and their client, the bankrupt herein, throughout all of the transactions and up to the filing of the petition in bankruptcy.

Their relations were of a confidential nature in all transactions.

From uncontradicted facts of this case standing alone, a strong inference of conspiracy can be drawn.

In the case of *Radin v. United States of America,* 189 Fed. 568, cert. den. 220 U. S. 623, the Court stated:

> "Conspirators do not go out on the public highways and proclaim their intention. They accomplish their purposes by dark and sinister methods and must be judged by their actions."

In the case of *Johnstone v. Morris,* 210 Cal. 580, the Court stated at page 590:

> "The jury may infer the conspiracy from all circumstances, and if the inference is a reasonable one it will not be disturbed on appeal."

In the case of *Revert v. Hesse,* 184 Cal. 295, p. 301, the Court stated:

> "The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the action from which conspiracy may be inferred. . . . The conspiracy may some times be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators and other circumstances . . .
>
> In the present action, while plaintiff was unable to prove any formal agreement between defendants . . . nevertheless, there was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction Sidney Beach participated as an intermediary. . . . These circumstances coupled with the further fact that the defendants . . . were not strangers, but were more or less occupying the same offices, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to the conspiracy which had for its object the fraudulent conversion complained of by plaintiff."

Beeman v. Richardson, 185 Cal. 280.

We believe that Rule 52 has been amply complied with. Rule 52 in part provides as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the case of *United States v. Aluminum Co. of America,* 148 F. 2d 416, the Court stated:

> "It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it;".

Killoren v. First National Bank in St. Louis, 127 F. 2d 537;

Kim v. Cox, 130 F. 2d 721;

Golstein v. Polakof, 135 F. 2d 45.

IV.

Conclusion.

We respectfully submit that there is nothing in the record to demonstrate that the Findings of Fact are clearly erroneous, and therefore the judgment should be affirmed.

Respectfully submitted,

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